

2001

The State of Utah v. Jeremy Hill : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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THE STATE OF UTAH,)	
)	APPELLANT'S BRIEF
Plaintiff,)	
)	
vs.)	COURT OF APPEALS NO.
)	20010248-CA
JEREMY HILL,)	
)	
Defendant.)	

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THIS IS AN APPEAL FROM A CRIMINAL CONVICTION ENTERED IN THE SIXTH
JUDICIAL DISTRICT COURT FOR SANPETE COUNTY, STATE OF UTAH. THE
HONORABLE KAY MCIFF, TRIAL JUDGE.

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FILED

AUG 09 2001

COURT OF APPEALS

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STATUTORY OR CONSTITUTIONAL LAW

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES

Sixth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have be previously ascertained by law, and to be the informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Article I Section 12, Utah State Constitution.

In criminal prosecutions the accused shall have the right . . . to be confronted by the witnesses against him, . . .

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

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JURISDICTION OF APPELLATE COURT

Authority for said appeal is found within the confine of Rule 26 of the Utah Rules of Criminal Procedure; Utah State Constitution Article 1, Section 12; Utah Code Annotated Section 77-1 6(g); and Section 78-2-2 (i) Utah Code Annotated.

STATEMENT OF ISSUES

Does sufficient evidence exist to bind the case over to trial from the preliminary hearing stage. The defendant challenged the use of hearsay as unreliable and also as a denial of his constitutional right to confront witnesses.

Defendant's initial objection to hearsay was made at the preliminary hearing. His objections were overruled. Thereafter, defendant filed a formal motion to 'Quash the Bind over'. This motion was denied also. See addendum.

STATEMENT OF CASE

Defendant appeals from a criminal conviction of 'Arranging to Distribute a Controlled Substance', a second-degree felony.

The defendant sought a dismissal of the information and an order quashing the 'bind-over' from the preliminary hearing. This motion was denied. The defendant entered a "Sery Plea" to the charge, reserving his right to challenge the conviction on appeal. Defendant argues that the State's evidence is insufficient and a denial of his right to confront witnesses.

STATEMENT OF RELEVANT FACTS

The defendant was accused of 'Arranging to Distribute a Controlled Substance', a second-degree felony. The date of offense is July 31, 1999. It is second count in the original information. The remaining counts were dismissed.

The preliminary hearing was conducted in the Justice of the Peace for Sanpete County on February 22, 2000. At the hearing, the State called only one witness, a

Deputy Sheriff Clark Thomas for San Pete County and a member of the Central Utah Narcotic's Task Force. Mr. Thomas simply read his police report containing information from a undisclosed confidential informant and others.

Officer Thomas reported that on July 31, 1999, he was conducting a narcotic investigation in Mt. Pleasant City, Utah (T.9 L.10-11). A confidential informant had contacted Thomas and informed him that he had a prior conversation with Mitchell Hill. The informant advised Thomas that he had arranged for Mitchell and his brother Jeremy to transport to Mt. Pleasant one-half ounce of methamphetamine. T.9 L.18-20. Police did not monitor this conversation. The only source for this data is the informant.

Shortly thereafter, a monitoring device was then placed on the informant. (T.9 L. 22-24). The anticipated meeting between Hill and the informant never took place. T. 10 L. 1.

Defendant upon cross-examination sought the name of the confidential informant who reportedly advised Thomas of the prior discussions. T. 13 L.3. The State objected to disclosing the informant's name and advised that they may do so in the future. The magistrate sustained the objection by the State and refused to have Thomas disclose the informant's name. T.13 L. 7-18. Defendant requested the Court adjourn the hearing and continue it until the informant could be disclosed. T. 19 L. 24 – T.20 L. 1-2. The Court refused and continued with the preliminary hearing. T.20 L.3.

Defendant continued his cross-examination. T.23. The informant apparently called Mr. Thomas in the morning hours of July 31, 1999. T.23 L. 8. The informant

had discussions between himself and Mr. Mitchell Hill. Again, the source for this information is only the informant.

However, Thomas did monitor, in part, the informant's second conversation with Mitchell Hill via a transmitter. Deputy Thomas was able to listen to the informant's portion of the phone conversation but not Mr. Mitchell Hill. T.25 L. 10-13; T.5 L.18.

Mr. Thomas was asked if he could recall the conversation between Mr. Hill and the informant and he testified: "No, not word for word". T. 23 L. 13; T.23 L. 19 ;T. 25 L. 4-9. The officer admits that he may or may not have been able to hear the conversation between Mitchell Hill (via the phone) and the informant (T.25 L. 16-17) or to Jeremy Hill. T.23 L.19. The officer was listening only to the informant's portion of the phone conversation.

No laboratory results were presented finding the substance to be methamphetamine. T.23 L. 22. However, the officer was fairly confident that he was present when a field test was conducted on the substance but that others tested the substance. He believed the substance to be methamphetamine. Neither field tests nor formal testing were introduced. T.24 L. 4-5.

Defendant argues that at the preliminary hearing the officer did nothing more than to take the stand and read the police report.

SUMMARY OF ARGUMENTS

The defendant is entitled to confront the witnesses against him. This right applies to all 'critical stages' of a criminal prosecution. Under the Utah statutory scheme, the preliminary hearing is a critical stage. The Court may even dismiss the charge lacking a finding of probable cause.

Here the State failed to present the critical witness to sustain their accusation. The substance of the State's charge rested on communications between the State's witness and the defendant and his brother. The State never called the witness at the preliminary hearing. The State called only one witness, a Deputy Thomas, who essentially read his police report to the Court refusing to disclose the name of the Informant.

The defendant asserts that his right to confront witnesses was denied.

ARGUMENT

THE CONFRONTATION CLAUSE OF BOTH THE UTAH AND FEDERAL CONSTITUTION APPLIES TO PRELIMINARY HEARINGS

The Confrontation Clause of both the Utah State Constitution and the United States Constitution is broader than the hearsay rule of the Utah Rules of Evidence. The admission of testimonial evidence may fall within an exception to the hearsay rule, yet violate the constitutional right to confront witnesses. The critical inquiry is whether the values embodied in the confrontation clause are impinged upon by the admission of the hearsay and, if so, whether there are adequate safeguards to protect those values. State v. Webb, (1989 Utah) 779 P2d 1108.

The Utah Supreme Court addressed issue in State v. Moosman, 794 P.2d 474 (Utah 1990). The Utah Supreme Court found the right of confrontation to be fundamental; guarded both by the federal and state constitutions. The Court found:

"Simply because testimony of extra judicial statements might be admissible under the hearsay exception does not mean that those statements automatically pass constitutional muster. If the

evidence violates a defendant's right to confront witnesses, it should not be admitted." (*Emphasis Added*)

The Court found the right does not exist to all statements admitted by an absentee witness at trial. The inquiry shifts to the extent of the violation. Is the violation significant or merely a technical argument lending little to the fact-finding process? The Court then made a two-prong analysis:

"First, we look at whether the State's presentation of hearsay testimony of extra judicial statements or occurrences is "crucial" to the State's case or "devastating" to the defendant.

Second, we look at the availability of the declarant and whether the presence of the declarant will add any probative value to the evidence by allowing the trier of fact to observe the demeanor of the witness."

In Moosman, the Utah Supreme Court found the violation not substantial and affirmed the conviction. In essence, the Court found the admission of declarant's statement was so insubstantial that it did not mandate reversal.

In Moosman, the Utah Supreme Court cites Reardon v. Manson, 806 F.2d 39 (2nd Cir. 1986) cert. denied, 481 U.S. 1020 (1989). The Reardon court found the confrontation clause is not necessarily violated by the prosecution's failure to produce a hearsay declarant for cross-examination where the "utility of the trial confrontation" would be remote and of little value to either the jury or the defendant. See first prong of the Moosman case.

Nevertheless, both the United States Supreme Court and Utah case law have recognized the importance of confrontation when the State attempts to introduce the statements of co-defendants. Bruton v. United States, 391 U.S. 123 (1968); Richardson

v. Marsh, 481 U.S. 200 (1987); State v. Kendricks, 538 P.2d 313 (Utah 1979) and State v. Travis, 541 P.2d 797 (Utah 1975) requiring a co-defendant's statements to be excluded unless the co-defendant was present and subject to effective cross-examination.

In Bruton and Richardson state that the right of confrontation is fundamental and a violation of this right requires reversal. In Bruton, the conviction was reversed due to statements of a co-defendant being introduced when the co-defendant was not present at trial and subject to cross-examination. In Richardson, the Court allowed a co-defendant's admission into evidence as long as the statement was not incriminating the other defendant. See Kendrick and Travis for similar holdings of the Utah Supreme Court.

Defendant argues that a violation of his right to confront witnesses occurred at the preliminary hearing. The violation was not merely technical but went to the substance of the State's case. The "arranging for the distribution of a controlled substance" was based on the communications between the informant and Mitchell Hill with his brother Jeremy being an accomplice. Thomas was not privy to these discussions. Thomas reports that the informant told him about the arrangement in the morning and Deputy Thomas hears only the one-sided phone conversation between the informant and Mitchell Hill. It is on these discussions that the arranging charge stands and Jeremy Hill was denied the opportunity to cross-examine the informant.

There was no opportunity to expose weaknesses in the State's case that may cause the magistrate to dismiss the case. No effective interrogation of the informant was available to fashion an impeachment tool for trial. Defendant could not explore or develop favorable testimony to his defense. He was denied the opportunity to use the

preliminary hearing as a discovery device to explore the State's case against him and to prepare a proper defense to meet that case at trial. He could not make preparation of a proper defense to meet that case at the trial.

Utah case law requires the exclusion of a known co-defendant's testimony at trial. State v. Kendrick, supra; State v. Travis, supra. Defendant argues that both Federal and Utah case law requires the exclusion of known co-defendant's statements at trial. The defendant submits that the State cannot use statement of a hidden and unknown informant's alleged statements at the preliminary hearing.

*DOES THE RIGHT TO CONFRONT APPLY AT THE
PRELIMINARY HEARING STAGE?*

Effective January 1995, an amendment to Art. I Section 12 of the Utah State Constitution was made. It provides as follows:

In criminal prosecutions the accused shall have the right . . . to be confronted by the witnesses against him, . . .

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.
(Emphasis Added)

Arguably, the amendments to the Utah State Constitution may modify the right to confront witnesses under Utah Constitutional law. However, the state amendment does not modify the Federal Constitution which provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have be previously ascertained by law, and to be the informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence. (Emphasis Added).

In defining the preliminary hearing, Utah Courts have consistently held:

The purpose of the right to a preliminary hearing is to secure to the accused, before he is brought to trial under an information, the right to be advised of the nature of the accusation against him and to be confronted with and given an opportunity to cross-examine the witnesses testifying on behalf of the State. State v. Sommers, 597 P.2d 1346, 1347 (Utah 1979); State v. Pledger, 896 P.2d 1226 (Utah 1995).

The United State Supreme Court has found the Sixth Amendment to be applicable to the States at all critical stages of a criminal prosecution. In U.S. v. Wade, 388 U.S. 218, 87 S.Ct 1926, 18 L.Ed. 2d 1149 (1967), the Supreme Court held that an accused was entitled to the presence of counsel at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.

In Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed 2d 387 (1969) the Court found that the preliminary hearing was a critical stage in Alabama's criminal process and thereby required an indigent defendant to have counsel at this critical stage (as at the trial itself). Coleman v. Alabama, 399 U.S. 1 (1970). See also Powell v. Alabama, 287 U.S. 45, 57 (1932); Pointer v. Texas, 380 U.S. 400 (1965). Alabama's preliminary hearing is essentially the same as Utah's.

The Utah Supreme Court previously dealt with this same issue in State v. Anderson, 612 P.2d 778 (Utah 1980). Reviewing both Federal and State law, the Court found that the preliminary hearing is a 'critical stage' in the criminal prosecution and that the right of confrontation is guaranteed under Art. I. Section 12 of the Utah State Constitution.

In Anderson, the defendant was accused of tampering with a witness. The defendant Anderson was the Chief of Police in Soldier Summit and the co-defendant Brackenbury was Justice of the Peace. Both Anderson and Brackenbury went to the tavern to investigate the suspected illegal sale of alcohol.

In the saloon, a confrontation ensued between Anderson and Garner, the manager of the saloon. During the confrontation, a patron/bouncer of the saloon, Applegate, came to the aide of Garner. Upon learning that Anderson was the Chief of Police, he returned to his original place at the end of the bar. The confrontation escalated and ended with Garner striking Anderson in the face. Anderson advised Garner that he was under arrest. Anderson then left the saloon to enjoin the aide of assisting officer Curtis. Brackenbury then left the saloon and returned to his trailer which also served the Justice Court. Anderson and Curtis then returned to the saloon and forcibly detained Garner. In the ensuing scuffle, Garner was thrown to the floor, handcuffed and removed. Curtis took Garner to jail.

Anderson then returned to the saloon and arrested Applegate, taking him to Brackenbury's trailer. Once inside the trailer, Brackenbury proclaimed the Justice Court to be in session. Anderson then proceeded to physically intimidate Applegate into signing false statements concerned Garner striking Anderson and Applegate's purchase of liquor from Garner. Applegate advised later that he signed the statements in fear of

further violence. Deputy Curtis corroborated Applegate's account of the incident and advised that Anderson admitted to roughing up Applegate.

At the preliminary hearing, Garner and Curtis were presented as witnesses. However, the prosecution, instead of presenting Applegate at the preliminary hearing, move to introduce Applegate's sworn affidavit relating the substance of his testimony. The Court found Applegate was in Oklahoma and the inconvenience of bringing him to Utah rendered his absence permissible. At trial, both defendants were convicted.

The Anderson Court went into a lengthy discussion of the historical significance of the right to a preliminary hearing in Utah and focused on whether the confrontation right is necessary to insure the protection of any substantive rights of the accused.

The Court concluded that the preliminary hearing in Utah is a critical stage in the criminal process and certain procedural safeguards are recognized as necessary to guarantee the accused's substantive rights to a fair hearing. The Court found that one of the fundamental purposes is to ferret out groundless and improvident prosecutions. It is a protection afforded the accused to relieve him of the substantial degradation and expense incident to a modern criminal trial where the evidence is insufficient and the charges unwarranted. It also provides the accused notice of the nature of the accusation of the charges against him. See also State v. Jensen, 34 Utah 166, 96 P. 1085 (1908).

The Anderson Court, reviewing the Federal Sixth Amendment rights, cited U.S. v. Wade, 388 U.S. 218, 87 S.Ct 1926, 18 L.Ed. 2d 1149 (1967) applying the Sixth Amendment protections to all critical stages of the criminal process. The Anderson Court further cited Coleman v. Alabama, 399 U.S. 1, at 9, 90 S.Ct. 1999, 26 L.Ed 2d 387 (1969), applying the protections of the Sixth Amendment (right to counsel) to the accused at the preliminary hearing stage.

The Coleman Court found that the right to counsel at the preliminary hearing (referencing the Right to Confrontation) was essential to the accused's protection against erroneous or improper prosecution, and stating:

First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who doesn't appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible preparation of a proper defense to meet that case at the trial.

The Anderson Court found that the introduction of certain material testimony, albeit admissible under the hearsay exemption, would seriously curtail the defendant's ability to present an affirmative defense at the preliminary hearing; denying him the protections provided by the confrontation of witnesses.

Most recently in State v. Clark, 20 P.3d 300 (Utah 2001), the Utah Supreme Court, cited approvingly State v. Anderson. The Court found that the preliminary hearing is not a trial per se but not a ex parte proceeding and not a one-side determination of probable cause. The Court found that an accused is granted a statutory right to cross-examine the witnesses against him with attendant rights to subpoena and present witnesses in his defense. State v. Clark, 20 P.3d 300 (Utah 2001) at page 306, footnote 3. The Court however noted the amendment to Art. I Section 12 and Utah R. Crim. P. 7(h)(2) allowing the admission of reliable hearsay.

(*Note State v. Pledger, 896 P.2d 1226 (Utah 1995), see footnote 4, which implied that the United States Supreme Court held that the protection afforded criminal

defendants by the Sixth Amendment's Confrontation Clause did not extend to preliminary hearings. The Court cited by reference Gerstein v. Pugh, 420 U.S. 103, 120-122, 95 S.Ct. 854, 43 L.Ed 54 (1975). However, the Gerstein decision dealt with non-adversarial bail hearings and not preliminary hearings (as Utah's and Alabama's). Gerstein found the Fourth Amendment (not Sixth) required a judicial determination of probable cause as a prerequisite to extended restraints of liberty following arrest. The Court in State v. Clark found preliminary hearings to be adversarial where an opportunity exists for the charges to be dismissed.)

The Federal Sixth Amendment is applicable to all critical stages of the criminal prosecution and more particularly to Utah's preliminary hearings. Coleman v. Alabama,supra; Powell v. Alabama, supra; U.S. v. Wade,supra. State v. Anderson, supra, State v. Clark.

APPLICATION TO THIS CASE

Here, the State called only one witness, Clark Thomas. He essentially read his police report. He provided testimony regarding conversations by an unnamed, non-disclosed confidential informant. Over objection from the defense, the Court refused to compel the State to disclose the informant. The Court refused to continue the hearing until such time as the informant could be disclosed and obviously denied the defendant access to this potential witness.

Furthermore, The State failed to present a laboratory result on the substance the State believed to be methamphetamine. The officer believed that someone did a field test on it but he was unsure. The officer was not a witness to any exchange of narcotics for money. He relied on statements made by an undisclosed informant.

With the informant hidden, the defendant was denied a significant or

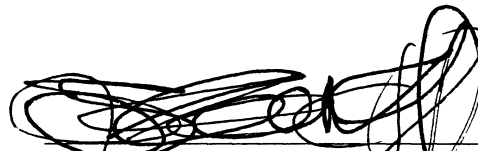
meaningful preliminary hearing. He could not bring the weaknesses (fatal or otherwise) in the State's case to light, which may have lead the magistrate to dismiss the case. He had no ability to fashion a vital impeachment tool for use in cross-examination of the State's witness at trial. He could not preserve testimony favorable to his defense of a witness who did not appear. He could not effectively discover the State's case, essentially negating any preparation of a possible defense at the trial. In essence, he was denied his right to a preliminary hearing.

CONCLUSION

It appears fairly evident that the preliminary hearing was not much more than 'sham'; filling the need of a preliminary hearing mandated by statute. The officer essentially did nothing more than hand in his police report to the defendant and the Court.

The substance of the State's accusation exists in the testimony of the informant who remains unknown and hidden. It delegates to the police the ability to secret witnesses and essentially deny the defendant's right to confront witnesses. It further denies the accused of the right to a meaningful preliminary hearing and thereby effective assistance of counsel.

DATED this 8 day of August, 2001.



SHELDEN R CARTER
Attorney for Defendant

ADDENDUM

1. District Court Ruling Denying Motion to Quash Bindover.

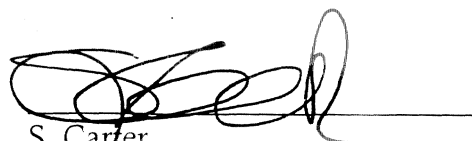
MAILING CERTIFICATE

I hereby certify that I mailed a copy of motion and order to extend time to file
appellant's brief to:

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124 State Capitol
Salt Lake City, Utah 84114

Utah Court of Appeals (eighth copies)
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DISTRICT COURT, SANPETE COUNTY, UTAH

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The State of Utah,

Plaintiff,

vs.

Jeremie Edward Hill,

Defendant.

Order Denying Motion to Quash Bindover

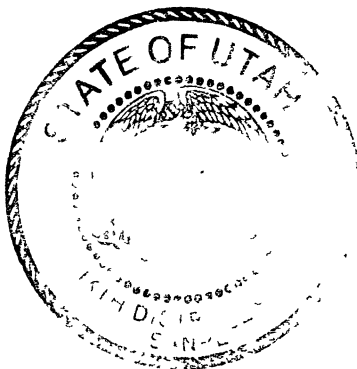
Case No. 991600115

Assigned Judge: K. L. McIff

Defendant objects to the use of hearsay evidence at the preliminary hearing held herein, but fails to establish how the purposes of the preliminary hearing have been defeated. In essence defendant objects to the overall approach to conducting preliminary hearings which is now firmly rooted in Utah's constitutional, statutory, and case law as well as applicable rules of evidence. The State is obliged to respond to reasonable discovery requests and to disclose the identity and anticipated testimony of witnesses sufficiently in advance of trial to allow proper preparation by the defense. This procedure is best suited to address the concerns expressed by defendant.

Defendant's motion to quash the bindover is accordingly denied.

Dated this 5th day of July, 2000.



K. L. McIff
District Court Judge